

**JOINT POWERS AGREEMENT
CITY OF FREMONT and CITY OF MILPITAS
2004**

This Joint Powers Agreement (hereinafter "Agreement") is made and entered into by and between the CITY OF FREMONT, a municipal corporation (hereinafter "Fremont"), and the CITY OF MILPITAS, a municipal corporation (hereinafter "Milpitas").

RECITALS

- A. Fremont and Milpitas are each a "public agency" as defined by Government Code section 6500.
- B. Fremont and Milpitas each share a common power, as defined by Government Code section 6502, generally described as providing recreation services to the public, and more particularly described in this Agreement.
- C. The general purpose of this Agreement is for Fremont to provide recreation services to Milpitas, in return for Milpitas' payment to Fremont, based on the terms more particularly described in this Agreement.
- D. Fremont and Milpitas desire to enter into this Agreement in accordance with the provisions of the Joint Exercise of Powers Act (Government Code sections 6500, *et seq.*), in particular the immunity protections of Government Code section 6513, and the provisions of Government Code sections 895 through 895.8.

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND CONDITIONS IDENTIFIED HEREIN, THE PARTIES HEREBY AGREE AS FOLLOWS:

- 1. **SCOPE OF SERVICES.** Milpitas hereby delegates authority to Fremont to perform, and Fremont hereby agrees to perform, the services described in Exhibit "A," attached hereto and incorporated herein by reference, in accordance with the terms and conditions contained in this Agreement.
- 2. **BILLING AND PAYMENT.** In order to request payment for services provided in accordance with this Agreement, Fremont shall submit appropriate documentation to Milpitas identifying the services performed and the charges therefore, based upon the payment provisions set forth in Exhibit "A," attached hereto and incorporated herein by reference. Milpitas shall make payments to Fremont for services performed in accordance with this Agreement within thirty days after receipt of invoice from Fremont. If Milpitas disputes any portion of the request for payment from Fremont, Milpitas shall provide written notice of the dispute to Fremont within thirty days after receipt of invoice from Fremont.

3. AUTHORIZED REPRESENTATIVES.

3(A). Fremont's Authorized Representative. All services performed by Fremont under this Agreement shall be performed by, or under the supervision of, Fremont's Authorized Representative, **Jeff Gonce**, unless otherwise designated in writing by Fremont's Authorized Representative or the Fremont Assistant City Manager.

3(B). Milpitas' Authorized Representative. For the performance of services under this Agreement, Fremont shall take direction from Milpitas' Authorized Representative, **Rosana Cacao, Program Coordinator** unless otherwise designated in writing by Milpitas' Authorized Representative.

4. INFORMATION AND DOCUMENTATION.

4(A). Accounting Records. Milpitas and Fremont shall maintain all accounting records related to this Agreement in accordance with generally accepted accounting principles and state law requirements, and in no event for less than four years. The accounting records to be maintained in accordance with this Agreement shall include, at a minimum, documents which support Fremont's costs and expenses related to this Agreement, including documentation of requests for services, services performed, invoices, and payments. Each party's accounting records shall be made available to the other party within a reasonable time after request, during normal business hours.

4(B). Ownership of Work Product. All original documents prepared by Fremont (including its employees and agents) for this Agreement ("work product"), whether complete or in progress, are the property of Milpitas, and shall be given to Milpitas at the completion of Fremont's services, or upon demand by Milpitas. Fremont shall have a right to make and keep copies of the work product.

5. RELATIONSHIP BETWEEN THE PARTIES. Milpitas and Fremont are each an independent "public agency," as defined by Government Code section 6500, and this Agreement does not create a separate legal entity. Each party shall, at all times, remain an independent public agency solely responsible for all acts of its employees or agents, including any negligent acts or omissions.

5(A). Fremont (including its employees and agents) is not Milpitas' agent, and shall have no authority to act on behalf of Milpitas, or to bind Milpitas to any obligation whatsoever, unless Milpitas provides prior written authorization to Fremont. Fremont is not an officer or employee of Milpitas, and Fremont shall not be entitled to any benefit, right, or compensation other than that provided in this Agreement.

5(B). Milpitas (including its employees and agents) is not Fremont's agent, and shall have no authority to act on behalf of Fremont, or to bind Fremont to any obligation whatsoever, unless Fremont provides prior written authorization to Milpitas. Milpitas is not an officer or employee of Fremont, and Milpitas shall not be entitled to any benefit, right, or compensation other than that provided in this Agreement.

6. COMPLIANCE WITH LAW. Each party shall comply with all applicable legal requirements including all federal, state, and local laws (including ordinances and resolutions), whether or not said laws are expressly stated in this Agreement.

7. INSURANCE AND BONDS.

7(A). Each party shall, throughout the duration of this Agreement, maintain insurance (including, for the purpose of this section, self-insurance or coverage under a self-insurance pool) to cover each of their respective interests related to work performed under this Agreement (including coverage for their employees and agents). Concurrently with the execution of this Agreement, and prior to the commencement of any services, each party shall provide the other with written proof of insurance (including self-insurance or self-insurance pool coverage) (certificates and endorsements), in a form acceptable to the other party. Each party shall provide substitute written proof of insurance no later than 30 days prior to the expiration date of any insurance coverage required by this Agreement.

7(A)(1). Commercial General Liability (with coverage at least as broad as ISO form CG 00 01 01 96) coverage in an amount not less than \$1,000,000 general occurrence for general liability, bodily injury, personal injury and property damage. Each party shall name the other as an additional covered party or additional insured.

7(A)(2). Automobile Liability (with coverage at least as broad as ISO form CA 00 01 07 97, for "any auto") coverage in an amount not less than \$1,000,000 per accident for bodily injury and property damage.

7(A)(3). Workers' Compensation coverage as required by the State of California.

7(B). The parties hereby agree that, to the extent that a public officer has charge of any property, the public officer for each party shall be that parties' Authorized Representative. However, the parties further agree that, due to the nature of the services provided by Fremont to Milpitas pursuant to this Agreement, the amount of any official bond, as otherwise required by Government Code section 6505.1, shall be \$0.

8. INDEMNIFICATION. Fremont shall indemnify, hold harmless, and defend Milpitas (including its elected officials, officers, agents and employees) from and against any and all claims (including all litigation, demands, damages, liabilities, costs, and expenses, and including court costs and attorney's fees) resulting from Fremont's negligent performance, or willful misconduct, under this Agreement. Milpitas shall cooperate with Fremont in the defense of any action required by this section. Notwithstanding the foregoing, if Fremont is held liable upon a judgment for damages pursuant to this section, and Fremont pays in excess of its pro rata share in satisfaction of such judgment, Fremont is entitled to contribution from Milpitas pursuant to Government Code section 895.6.

9. TERM OF THE AGREEMENT. The term of this Agreement shall commence on the date last signed by the parties, below, and shall continue until completion of all services in accordance with the requirements set forth in Exhibit "A" of this Agreement. This Agreement may be terminated by either party without cause upon thirty (30) days written notice to the other party. If Milpitas exercises its right to terminate this Agreement in accordance with this paragraph, Milpitas shall pay Fremont for all services performed in accordance with this Agreement, through and including the date of termination, but not to exceed the payments according to the rates specified in Exhibit "A."

10. DEFAULT. If either party ("demanding party") has a good faith belief that the other party ("defaulting party") is not complying with the terms of this Agreement, the demanding party shall give written notice of the default (with reasonable specificity) to the defaulting party, and demand the default to be cured within ten days of the notice. If: (a) the defaulting party fails to cure the default within ten days of the notice, or, (b) if more than ten days are reasonably required to cure the default and the defaulting party fails to give adequate written assurance of due performance within ten days of the notice, then (c) the demanding party may terminate this Agreement upon written notice to the defaulting party.

11. NOTICES. All notices required or contemplated by this Agreement shall be in writing and shall be delivered to the respective party as set forth in this section. Communications shall be deemed to be effective upon the first to occur of: (a) actual receipt by a party's Authorized Representative, or (b) actual receipt at the address designated below, or (c) three working days following deposit in the United States Mail of registered or certified mail sent to the address designated below. The Authorized Representative of either party may modify their respective contact information identified in this section by providing notice to the other party.

TO: Fremont

Attn: Annabell Holland,
Parks & Recreation Director
3300 Capitol Avenue
P.O. Box 5006
Fremont, CA 94537

To: Milpitas

Attn: Bonnie Greiner,
Recreation Services Manager
457 E. Calaveras Blvd.
Milpitas, CA 95035

12. HEADINGS. The heading titles for each paragraph of this Agreement are included only as a guide to the contents and are not to be considered as controlling, enlarging, or restricting the interpretation of the Agreement.

13. SEVERABILITY. If any term of this Agreement (including any phrase, provision, covenant, or condition) is held by a court of competent jurisdiction to be invalid or unenforceable, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect; provided, however, this paragraph shall not be applied to the extent that it would result in a frustration of the parties' intent under this Agreement.

14. **GOVERNING LAW, JURISDICTION, AND VENUE.** The interpretation, validity, and enforcement of this Agreement shall be governed by and interpreted in accordance with the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of Alameda.
15. **ATTORNEY'S FEES.** In the event any legal action is commenced to enforce this Agreement, the prevailing party is entitled to reasonable attorney's fees, costs, and expenses incurred.
16. **ASSIGNMENT AND DELEGATION.** This Agreement, and any portion thereof, shall not be assigned or transferred, nor shall any of either party's duties be delegated, without the written consent of the other party. Any attempt to assign or delegate this Agreement without the written consent of the other party shall be void and of no force or effect. A consent to one assignment shall not be deemed to be a consent to any subsequent assignment.
17. **MODIFICATIONS.** This Agreement may not be modified orally or in any manner other than by an agreement in writing signed by both parties.
18. **WAIVERS.** Waiver of a breach or default under this Agreement shall not constitute a continuing waiver or a waiver of a subsequent breach of the same or any other provision of this Agreement.
19. **ENTIRE AGREEMENT.** This Agreement, including all documents incorporated herein by reference, comprises the entire integrated understanding between the parties concerning the services described herein. This Agreement supersedes all prior negotiations, agreements, and understandings regarding this matter, whether written or oral. The documents incorporated by reference into this Agreement are complementary; what is called for in one is binding as if called for in all.
20. **EACH PARTY'S ROLE IN DRAFTING THE AGREEMENT.** Each party to this Agreement has had an opportunity to review the Agreement, confer with legal counsel regarding the meaning of the Agreement, and negotiate revisions to the Agreement. Accordingly, neither party shall rely upon Civil Code section 1654 in order to interpret any uncertainty in the meaning of the Agreement.

EXHIBIT A
(SCOPE OF SERVICES)

Fremont shall provide an extensive tennis lesson program with the intent to build a strong tennis community in Milpitas. The parties agree as follows:

1. FREMONT SHALL:

- Provide all equipment, personnel, supervision and supplies necessary to complete all tennis instruction services. Additionally, Fremont shall bear all appropriate and normal costs of recruiting, training, managing and maintaining a professional staff for production of tennis instruction.
- Respond to each and every customer inquiry with a timely and professional response.
- Retain the right to set appropriate fees to maintain acceptable operating margins.
- Retain the sole right to determine the manner and methods by which tennis instruction services shall be provided under this Agreement.
- Contact Milpitas three (3) days prior to the first class meeting to verify class enrollment. If fewer than the established minimum number of students have enrolled for the course, class status will be mutually determined by the parties.
- Maintain its status as an independent Contractor for the purpose of providing services prescribed under this Agreement. Fremont shall not be deemed an agent, servant or employee of the City of Milpitas.
- Grant permission to Milpitas for the use of Fremont tennis promotional materials and information solely for the purpose of publicizing and promoting the tennis services provided under this Agreement without liability to Fremont.
- Ensure that Fremont tennis program staff wear appropriate Milpitas Recreation Services Contract Instructor identification while providing services under this Agreement only.
- Ensure that Fremont staff arrive promptly in order to provide timely service under this Agreement. In the unlikely event that Fremont staff are unable to provide timely service, Fremont shall ensure that staff arrange make up times for late or missed lessons.
- Receive 75% of gross Milpitas resident fees collected as compensation for services rendered under this Agreement. Fremont shall not be entitled to any portion of the \$10.00 Milpitas non-resident fee collected pursuant to this Agreement. Payment shall be received not later than 30 days following the final class of each session. A copy of a City of Milpitas' "Statement of Contractual Fees" shall accompany payment.

2. MILPITAS SHALL:

- Provide and maintain tennis facilities used for tennis lessons in a safe and clean manner in order to ensure a positive environment for students and Fremont staff.
- Compensate Fremont in an amount equal to 75% of gross Milpitas resident fees collected pursuant to this Agreement. Milpitas shall retain any and all \$10.00 non-resident fees. Ensure timely processing of payment for services not later than 30 days following the final class of each session. Include a copy of Milpitas' "Statement of Contractual Fees" with each payment to Fremont.
- Provide the following program administrative support:
 - Conduct program registration and collect program fees
 - Process refunds and transfers
 - Resolve customers complaints and concerns
 - Provide approved, reserved confirmation and public notice of facility use
 - Provide Milpitas staff liaison for program coordination with Fremont staff as a single point of contact